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NO. 25217-5-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

FEATURE REALTY, INC., et al.,

Appellants,

v.

PRESTON GATES & ELLIS LLP; et al.

Respondents.

RESPONDENTS' BRIEF

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I. INTRODUCTION

Plaintiffs and Appellants are California real estate developers (hereinafter the "California Developers" or the "Developers"). They planned to build an apartment complex in Spokane. They ran into zoning and permitting problems with the City. As a result, the Developers sued the City several times. That litigation fully settled in 2005, ten years after the first suit commenced.

The California Developers also sued their former counsel, Preston Gates & Ellis and Preston attorney Jerry Neal (collectively "Preston"). The Developers alleged that Preston's putative malpractice led to the failure of their 1998 settlement with the City.

The Developers have filed the same legal malpractice case three times. Twice before they voluntarily dismissed it. They first sued Preston in California in 2002. In mid-2003, they sought and received an order of voluntary dismissal without prejudice. They re-filed in King County, Washington. Several months later, they sought and received a second order voluntarily dismissing the case. Thereafter, they commenced the present case.

Preston moved for summary judgment. The trial court correctly dismissed this, the Developers' third case, under CR 41(a)(4). That rule provides that a plaintiff may only take one voluntary dismissal without prejudice. The second voluntary dismissal, as a matter of law and regardless of whether it is styled "without prejudice," operates to dismiss all claims with prejudice. *Spokane Co. v. Specialty Auto & Truck Painting, Inc.*, 153 Wn.2d 238, 246, 103 P.2d 792 (2004).

Preston also sought summary judgment because the statute of limitations had run before this case was filed. The trial court incorrectly perceived an issue of fact. This Court can affirm the summary judgment on the alternate grounds that, as a matter of law, the Developers' claim is time-barred. This Court need only reach that issue, however, if it does not affirm the trial court's decision under CR 41.[1]

[1] The Developers knew Preston would raise their statute of limitations defense on appeal. They chose not to address it in their opening brief. *See* Preston's Notice of Cross-Appeal, June 6, 2006.

II. RESTATEMENT OF THE ISSUES/ ASSIGNMENTS OF ERROR

1. Under CR 41(a)(4), did the trial court properly dismiss this case because the California Developers had voluntarily dismissed two previous identical actions against Preston?

2. Did the trial court properly determine that a CR 41(a)(4) dismissal as to Preston warranted dismissal as to Mr. Neal, who was in privity with Preston?

3. Did the trial court err in determining that an issue of fact precluded dismissal on statute of limitations grounds?

III. STATEMENT OF THE CASE

This case began 11 years ago, when the California Developers sued the City of Spokane. The California Developers sought damages for the City's 54-day delay in issuing a grading permit for what was then known as "Mission Springs." Mission Springs, now known as "Canyon Bluffs," was a planned 800-unit apartment complex (the "Project"). The trial court dismissed the suit. The Developers appealed, and in 1998, the Supreme Court reversed. It held that the City was liable as a matter of law for

arbitrary and capricious conduct. *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 954 P.2d 250 (1998).

Settlement negotiations ensued. The California Developers were represented during much of that process by Spokane attorney Frank Conklin. In the summer of 1998, the Developers involved California attorney Terry Butler. In August 1998, they also involved Preston's Jerry Neal. In October 1998 a settlement agreement (the "1998 Settlement") was signed. The City Council approved it formally, but not in open public session as required by Washington's Open Public Meeting Act, RCW 42.30 (the "Act").

Shortly after the 1998 Settlement, the City and the California Developers clashed over its proper interpretation. Further litigation ensued. In December 2000, the City argued for the first time that the 1998 Settlement was void due to noncompliance with the Act. CP 1100. In August 2001, federal judge Alan MacDonald agreed. He declared the 1998 Settlement void. The Ninth Circuit affirmed.

Meanwhile, the California Developers revived their damages suit against the City. They claimed that the City had arbitrarily and capriciously caused years of delay and increased

construction costs for the Project. They sought damages of over $20 million. *E.g.*, CP 1104. Their case against the City settled for $850,000 in cash, the City's waiver of construction fees, a $5.5 million consent judgment, and an assignment of claims against the City's non-settling insurers. The City received, in exchange, a covenant not to execute on the $5.5 million judgment. CP 1180-86. The Developers have already collected $500,000 from one of the City's insurers. CP 1184.

A. By March 2000, Mr. Morley Was The California Developers' Independent Lead Counsel.

The California Developers are sophisticated. They frequently use litigation as a business tool, and have used it to their advantage throughout the course of this construction project.[2]

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[2] Suits initiated by the California Developers against the City include Spokane County Superior Court Cause No. 95-2-03773-03, Spokane County Superior Court Cause No. 03-00670-4, U.S. District Court (Eastern District of Washington) Cause No. 00-CS-444AAM, and Spokane County Superior Court Cause No. 03-0-1288-7. Other suits relate directly to the Project but were not against the City; *e.g.*, *Mission Springs v. Clardy*, Stevens County Cause No. 97-2-00083-0, CP 1088.

In addition to Project-related suits that they initiated, the California Developers have been parties in numerous other suits. *Id.* One was an action by Developer Rusty Lugli against his personal injury attorney for legal malpractice. CP 1089-90.

Blaine Morley is an Oregon attorney. By 2000, Mr. Morley had represented the California Developers for well over ten years. Over 60 percent of his work has been for them. CP 1125-26. No later than March 28, 2000, he replaced defendant Terry Butler as counsel to the California Developers in their dispute with the City. CP 1123-24. Mr. Morley did most of the drafting and discovery for the Developers in their lawsuits against the City. Jerry Neal served, for a period of time, as his local counsel. CP 1121-22; 1137-38.

Mr. Neal remained as counsel of record to the California Developers until approximately February 2002. CP 1143. However, the California Developers had ceased to depend or rely on Mr. Neal over two years earlier. Here are the Developers' undisputed admissions:

- At least as of April 12, 2000, the California Developers were preparing to replace Jerry Neal as lead counsel. They believed that, in Mr. Morley's words, Mr. Neal had "a conflict a mile long" because Preston represented the City on unrelated matters. CP 1135-37, 1144.

- They also believed, by April 2000, that Mr. Neal would "be a witness in the case" against the City and did not wish to represent the California Developers at trial. CP 1144.

- On November 20, 2000, Developer Lugli complained that Mr. Neal was not communicating or taking action, and "that you [Mr. Neal] may have a reluctance to help in our pursuit for justice." CP 1117-18; 1146.

- On December 2, 2000, over a year before Preston's services were formally terminated and more than three years before filing this suit, Developer Lugli wrote to Mr. Morley and Mr. Lugli's co-Developer, Jack Krystal. He enclosed a copy of a draft engagement letter with another Spokane firm. "This is a copy of the contract [with new counsel], anticipating that Jerry Neal would bow out when we got into litigation with the City." CP 1147.

- At least by December 2000, the California Developers and Mr. Morley so distrusted Mr. Neal that they decided not to inform him of their litigation strategy against the City or their plans to replace him. On December 5, 2000, Mr. Morley wrote to Developer Krystal:

> So, I'll do the research, attend the meeting and keep you posted. Needless to say, ***do not share this memo or any part of it with anyone, including Jerry Neal.*** It is intended as a strictly protected attorney-client communication and the part involving selection of a new attorney ***should not come to Jerry's attention yet.***

CP 1150.[3]

B. The California Developers Discover the Alleged Malpractice.

No later than December 2000, Mr. Morley advised the California Developers of the City's claim that the 1998 Settlement was void. Mr. Morley admits telling them that this created serious exposure because it threatened to void the 1998 Agreement. Mr. Morley admits that the California Developers were unhappy to receive this news, and were equally unhappy to be incurring the attorney's fees and suffering the delay attendant upon this new argument. CP 1113-16, 1119-20, 1127-33. It is undisputed, in short, that the Developers knew, in December 2000, that they were damaged.

[3] At least by August 2001, the California Developers and Mr. Morley were expressly discussing suing Mr. Neal. Mr. Morley wrote to Developers Lugli and Krystal: "Rusty and Jack: I do not want this ... to go to Jerry.... Now that the Judge has ruled that the Settlement Agreement is void, it raises a question ... of malpractice that involves Terry Butler and Jerry Neal." CP 1151.

C. The Three Malpractice Filings.

1. The California Case.

In July 2002, the California Developers sued Preston and Terry Butler in Superior Court in Los Angeles ("California Case"). CP 1152-57. The California court determined that it lacked jurisdiction over Mr. Neal and that the forum was inconvenient. On January 14, 2003, it ordered that the California Case be ***stayed*** so that the California Developers could file a case in Washington. CP 1158-60.

As of a status conference on July 14, 2003, the California Developers still had not filed the case in Washington for what they acknowledge were ***tactical*** reasons. CP 831-33. The Developers wanted to maintain the lawsuit against Terry Butler in California while pursuing an action against Preston in Washington. CP 832-33. The California Court told the Developers' attorney that if the Developers maintained a separate California action against Mr. Butler while suing in Washington, it would grant a motion for sanctions ***brought by Mr. Butler.*** CP 833. That is all that the threat of sanctions related to.

On July 28, 2003, the California Developers voluntarily requested that the California Case be dismissed without prejudice. The voluntary dismissal was not joined in (or even approved as to form) by Preston. The California court clerk signed the dismissal on July 29, 2003. CP 1168.

2. The King County Case.

The California Developers filed suit in King County Superior Court on July 24, 2003 ("King County Case"). However, they failed to serve process within 90 days. The Developers moved to voluntarily dismiss it pursuant to CR 41. CP 1169-70. On February 23, 2004, the court granted that motion. CP 1171-72.

3. The Present Case.

On March 2, 2004, the Developers re-filed this suit under a new cause number in King County ("Present Case"). CP 1173-79. On Preston's motion, and over the objections of the California Developers, venue of the Present Case was changed to Spokane County.

D. Summary Judgment in the Present Case.

Preston and Mr. Neal, together with Mr. Butler, filed a Joint Motion for Summary Judgment. They argued that the Present Case should be dismissed with prejudice on two grounds: (1) it was brought in violation of CR 41 because the California Developers had voluntarily dismissed two previous actions; and (2) the statute of limitations had run. CP 1069-80.

After extensive briefing and review of a voluminous record, the trial court dismissed the action based upon CR 41, and, with respect to Mr. Butler, the statute of limitations as well. CP 1211-13.

The Court found that the facts regarding the two previous voluntary dismissals were undisputed. What remained was a purely legal question—the proper application of CR 41. Verbatim Report of Proceedings ("RP") 62-63. The Court found that voluntary dismissal of the King County Case triggered the rule. RP 65. The Court held "Under Washington law, under *Specialty Auto* ... the [S]econd [King County Case] operates as a bar." *Id.*

The court held that under *Specialty Auto,* it had no discretion, but even if it did, this was not a case for equity. RP 64-65. The California Developers had several chances to get it right. There

was no reason why the Developers could not have pursued the King County Case, rather than voluntarily dismissing it and filing the Present Case.

> If this had been a one-bite-at-the-apple rule, perhaps you might get involved in all kinds of equities. But as counsel points out, it is not the California dismissal that [bars the litigation]—although obviously it has to be there—but it is the fact that it goes to King County and then it's dismissed again that ultimately triggers the rule.

RP 65.

As to the statute of limitations, the trial court found it undisputed that by December 2000, the California Developers had discovered the alleged malpractice. RP 62 ("in December of 2000, ... the city put everyone on notice that there was a problem"). The Developers do not dispute this. The trial court held, however, that whether continuous representation existed was a question of fact based upon events occurring after December 2000. RP 66-67. The court did not identify those facts. It did not articulate any disputes about Preston's relationship with the California Developers during and after December 2000. *Id.*

IV. ARGUMENT

A. The Two-Dismissal Rule Bars The Developers' Present Case.

1. In *Specialty Auto*, Washington adopted a bright line test, which requires dismissal of the Developers' Present Case.

Washington has adopted the "two-dismissal" rule, which prohibits plaintiffs from filing a suit that has been dismissed twice before. Civil Rule 41(a)(4) provides:

> *Effect.* Unless otherwise stated in the Order of Dismissal, the dismissal is without prejudice, ***except that an Order of Dismissal operates as an adjudication upon the merits when obtained by a plaintiff who has once dismissed an action based on or including the same claim in any court of the United States or of any state.***

(Emphasis added.) Thus, under CR 41, the second dismissal without prejudice becomes a final adjudication on the merits.

The rule is self-executing and does not permit consideration of the circumstances behind the two prior dismissals. "The plain language of the 'two dismissal rule' of CR 41(a)(4) does not allow for court discretion." *Specialty Auto*, 153 Wn.2d at 246. *Accord, Guillen v. Pierce County*, 127 Wn. App. 278, 285, 110 P.3d 1184 (2005), *rev. denied*, 156 Wn.2d 1006, 132 P.3d 146 (2006) (trial court

erred in considering plaintiffs' intent in applying two dismissal rule).

The rule applies as long as the plaintiff requested the prior dismissals. In *Specialty Auto,* the County was plaintiff. It filed two identical actions against the defendant. 153 Wn.2d at 242. In response to a defense motion, and after informal discussions between the parties, the County moved for dismissal without prejudice of the first of its cases. *Id.* The order dismissing the first case did not reflect a stipulation for voluntary dismissal. *Id.* The County then voluntarily dismissed its second case, *id.,* and filed a third one. The Court of Appeals' opinion suggests that the County took those steps to "give this matter a fresh start" and to "synchronize" the County's action with a lawsuit it expected defendant Specialty Auto to file. *Spokane Co. v. Specialty Auto & Truck Painting, Inc.,* 119 Wn. App. 391, 394, 79 P.3d 448 (2003).

Defendant moved, under CR 41, to dismiss the County's third case. The trial court denied the motion on grounds, among others, that the purpose of the rule was to avoid "harassment," of which it found none. *Specialty Auto,* 119 Wn. App. at 395. The Court of Appeals reversed and ordered dismissal of the County's

third suit. It "read CR 41(a)(4) to require dismissal following two voluntarily dismissals, regardless of whether the facts suggested harassment of the defendant...." 153 Wn.2d at 244. The Supreme Court affirmed.

In so doing, the Supreme Court explicitly dealt with the Developers' present suggestion that CR 41(a)(4) is strictly construed in favor of resolution on the merits. To reconcile the two dismissal rule with the general desire to resolve cases on the merits, the Supreme Court announced a bright-line test: "We limit application of the two dismissal rule to dismissals that are a unilateral act of the plaintiff." 153 Wn.2d at 246. It observed that this test satisfies any concern about over-application of the voluntary dismissal rule, since "[u]nder our holding, ***the defendant may prevent abuse of use of the rule simply by declining to stipulate to dismissal.***" *Id.*, 246, n.2 (emphasis added). Here, Developers had the same option.

The Developers claim that the just-quoted passage shows that a court may consider evidence that "the defendant demanded or agreed to the dismissal" in deciding whether a dismissal under CR 41(a)(1) was not unilateral or voluntary. App. Br., 31. The

Developers misconstrue *Specialty Auto,* which does not permit the court to look at the reasons behind the actual dismissal. 153 Wn.2d at 246. If defendant formally stipulated to dismissal, as occurred in *Specialty Auto's* companion case, *Faust v. Bellingham Lodge,* then the dismissal is not voluntary or unilateral. 153 Wn.2d at 248. In *Faust,* the Court reversed a CR 41(a)(4) dismissal. It did so precisely because (unlike here) the defendant had formally stipulated to one of the plaintiff's two voluntary dismissals. 153 Wn.2d at 248.

Negotiations, discussions or statements before the court may not be considered. *Guillen,* 127 Wn. App. at 286. The test is mechanical: if the voluntary dismissal was by stipulation, it was not unilateral, and CR 41(a)(1) does not bar another suit. If defendant did not stipulate to the voluntary dismissal, dismissal was unilateral, and CR 41(a)(1) bars another action: "[T]he plain language of CR 41(a)(4) does not allow for court discretion [and] is self-executing." *Specialty Auto,* 153 Wn.2d at 246. As a matter of law, the plaintiffs' reasons or motives in obtaining either of the two dismissals are simply irrelevant. *Id.*, 247.

The California Developers have filed this case twice before. Each time they unilaterally and voluntarily dismissed it. In July

2002, they filed the California Case. Defendants appeared and successfully moved to stay that action. The order granting stay specifically stated that: (a) the trial court did not believe it had the authority to dismiss; and (b) all it could do, under California law, was stay the action. CP 1158.

On July 25, 2003, the Developers filed with the California Court a form labeled (at the bottom) "Request for Dismissal." CP 1168. The instructions to the Clerk read: "To the Clerk: Please dismiss this action as follows:". The "without prejudice" box is checked. There was no notice or hearing. The Clerk signed the order ministerially, three calendar days (one business day) later. *Id.*

On July 24, 2003, the California Developers filed the same action against the same defendants in King County. CP 1161-67. They could have perfected service in and prosecuted that case, but they failed to serve within 90 days and ***again unilaterally moved to dismiss***. Although the order in the King County Case recites that dismissal is "without prejudice" (CP 1171-72), that recital in a second dismissal order is ineffective as a matter of law. *Specialty Auto*, 153 Wn.2d at 248. After unilaterally dismissing twice, the

California Developers are automatically barred by CR 41(a)(4) from prosecuting this, their third action.

2. The Court cannot look behind the dismissals to evaluate the "voluntariness" of the Developers' dismissals.

There are very good reasons for the bright-line test laid down by the Supreme Court. It conforms to the language of the rule. It also avoids unnecessary and often speculative inquiry into motives and states of mind. If summary judgment under CR 41(a) could be denied because of fact questions as to why the Developers dismissed in California, those would become issues for *trial*. Testimony as to what the lawyers thought and what the California Court believed or communicated would be required. We are aware of no precedent for such a process.

Moreover, it will be the unusual case in which the defendant has not attempted to cajole the plaintiff into a dismissal, either by "threats," a motion, or some other form of attempted persuasion. If plaintiffs could avoid the two dismissal rule by the simple assertion that defendants demanded dismissal (or filed an answer demanding dismissal, which almost *always* occurs), the rule would be reduced to a nullity. In any event, there is no evidence that

Preston or Mr. Neal "threatened". Developers, who point only to the California court's remarks about sanctions if the Developers prosecuted an action against ***Mr. Butler*** in California while suing everyone else in Washington. CP 832-33.

The Developers claim that a plaintiff's "acquiescence" to a defendant's demand for dismissal does not trigger CR 41. *Guillen* holds to the contrary. 127 Wn. App. at 283-84. There, two identical cases were pending simultaneously. The defendant moved to dismiss the second case on grounds that the first had priority and was the only case that should continue. *Id.*, 283. Rather than dismissing the second case, the court transferred it to the judge before whom the first case was pending. *Id.* A few days later, the plaintiff voluntarily dismissed both cases under CR 41. 127 Wn. App. at 283-84. The plaintiff then filed his third action. *Id.*, 284. The trial court erroneously held that this did not violate the two dismissal rule because the defendant's arguments in favor of dismissal invited the plaintiff's actions. *Id.*

The appellate court reversed. It held that even if the plaintiff intended to acquiesce to the defendant's demands, intent was not relevant. *Id.*, 285. The defendant's statements and conduct were

equally irrelevant. *Id.*, 286-87. The bright-line test articulated in *Specialty Auto* governed: "Here, CR 41 is plainly written. When a plaintiff unilaterally and voluntarily dismisses the same claim twice, the second dismissal is with prejudice." 127 Wn. App. at 290.

Unlike here, the defendant in *Guillen* ***facilitated*** the CR 41 dismissals. Defense counsel signed the dismissal orders, approved them as to form, filed the dismissals for the plaintiff, and discussed the effect of the dismissals with the trial court. 127 Wn. App. at 283-88. Despite defense involvement and assistance, the court found that the dismissals were unilateral and voluntary.

Our case is stronger. Preston had nothing to do with the Developers' dismissal of the California Case. Preston did not stipulate to, sign or otherwise facilitate the dismissal. The Developers made a ***strategic, unilateral decision*** to voluntarily dismiss the California Case only after they had filed the King County Case. The dismissal was in the Developers' complete control.

Nor is there any evidence of Preston's involvement in the dismissal of the King County Case. The Developers never served

process on Preston, which never appeared or took any steps to defend.

3. Although Washington law governs the application of CR 41, federal law mandates the same outcome.

Developers cite to no Washington case for the proposition that this Court should look behind the previous two dismissals to determine whether they were voluntary. Washington case law is clear on this point—there is no discretion to consider the reasons behind facially voluntary dismissals. *Specialty Auto,* 153 Wn.2d at 246.

Developers rely solely on federal case law. Yet, federal courts in this Circuit apply Fed. R. Civ. P. 41 in the same manner as the state trial court did here. *See Lakes at Las Vegas v. Pacific Malibu,* 933 F.2d 724, 727 (9th Cir. 1991).

In *Lakes at Las Vegas,* the plaintiff had taken two previous voluntary dismissals under Fed. R. Civ. P. 41(a)(1). The defendant did not stipulate to either of them. 933 F.2d at 725. Plaintiff sued a third time. Defendant moved to dismiss. Plaintiff argued that the first dismissal was not voluntary, since it *could* have been ordered by the court. The Ninth Circuit disagreed;

> The term "voluntary" in Rule 41 means that the party is filing the dismissal ***without being compelled*** by another party or the court. In other words, it does not mean that other circumstances might not have compelled the dismissal or that the party desired it.

Id., 726 (citation omitted, emphasis added).

As in *Specialty Auto,* the Ninth Circuit held that it "does not consider the reasons for seeking a voluntary dismissal." 933 F.2d at 726. The Court noted that even if plaintiff's motives were relevant—which they were not—the plaintiff always had an alternative to voluntary dismissal: it could have let the defendants move for dismissal. *Id.*, 727. That is the rule of *Specialty Auto,* as well.

The Developers claim that other federal courts permit consideration of the reasons behind a voluntary dismissal. App. Br., 20-23. They are wrong. None of the Developers' cases state that a court may look behind a facially voluntary and unilateral dismissal to determine whether it was actually involuntary. In fact,

few of the cited cases involve two prior voluntary dismissals by the same plaintiff.[4]

The Developers assert that *Sutton Place Development v. Abacus Mtg. Investment Co.*, 826 F.2d 637, 640 (7th Cir. 1987) is similar to this case. App. Br., 22. The Developers ignore one salient fact: In *Sutton,* the second dismissal was not "voluntary" since it resulted from an ***order of the court, not the plaintiff's notice under CR 41.*** *Id.* The *Sutton* court did no more than apply the rule as written. It rejected defendant's request to apply the rule to a dismissal that on its face was court-ordered and involuntary, ***regardless*** of the underlying circumstances or intentions of the parties. *Id.*, 641.

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[4] *See Hughes Supply, Inc. v. Friendly City Electric Fixture Co.*, 338 F.2d 329, 330 (5th Cir. 1964) (first dismissal was ordered by the court in response to a motion to dismiss by defendants); *Dee-K Enterprises, Inc. v. Heveafil SDN. BHD.*, 177 F.R.D. 351, 355 (E.D. Va. 1998) (first dismissal was involuntary, since "plaintiff did not move for, stipulate to or notice the dismissal, the two dismissal rule is not implicated"); *Poloron Products, Inc. v. Lybrand Ross Bros. & Montgomery,* 534 F.2d 1012, 1017 (2nd Cir. 1976) (the first dismissal was formally stipulated by all the parties); *ASX Investment Corp. v. Newton,* 183 F.3d 1265, 1267 (11th Cir. 1999) (first action was dismissed by court order); *Island Stevedoring, Inc. v. Barge CCBI,* 129 F.R.D. 430, 432 (D.P.R. 1990) (the second dismissal was involuntary, resulting from a court order); *Loubier v. Modern Acoustics, Inc.*, 178 F.R.D. 17, 21 (D. Conn. 1998) (earlier dismissals were court ordered due to a "failure to prosecute," not voluntary action by the plaintiff); *In Re: Chi Chi's, Inc.*, 338 B.R. 618, 623-24 (Bankr. D. Del. 2006) (the "two dismissal rule" does not apply because the plaintiffs were different in the two prior dismissals).

The Developers also cite *Randall v. Merrill Lynch,* 820 F.2d 1317, 1320 (D.C. Cir. 1987). In *Randall,* the Court of Appeals upheld a trial court decision to vacate a second dismissal "in the interest of justice" under Fed. R. Civ. P. 60(b). 820 F.2d at 1320-21. Unlike the plaintiffs in *Randall,* the Developers never asked the California court to vacate the first dismissal and cannot do so in this action. *See* Wright & Miller, FEDERAL PRACTICE & PROCEDURE, § 2368 at 330 (1995) ("the rule cannot be attacked collaterally in a third suit on the claim").

The Developers cite only one case where, after two voluntary dismissals under Fed. R. Civ. P. 41(a)(1), a court permitted a third action to proceed. *See Western Group Nurseries, Inc. v. Ergas,* 211 F. Supp. 2d 1362, 1369 (S. D. Fla. 2002). In that case, unlike here, the defendant waited ***ten years after the third action was filed*** before moving to dismiss. The federal district court found that it was "in the interest of justice" to allow the

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(footnote continuation)

Even Developers' recently submitted additional authority does not involve two prior voluntary dismissals. *Murray v. Conseco, Inc.,* __ F.3d __, 2006 WL 301404, *3 (7th Cir. 2006) (second action was dismissed for lack of jurisdiction upon the defendant's motion).

litigation to proceed. Although the "two dismissal rule" applied, the defendant sat on his rights for ten years while the litigation was pending. *Id.*, 1371. There was no dispute, however, that the two prior dismissals were "voluntary." *Western Group Nurseries* has no relevance here. Nor do the Developers in their Opening Brief raise any prejudice similar to that described in *Western Group Nurseries*. They may not do so in Reply.

4. The Developers voluntarily opted to dismiss the same case twice.

Although not relevant, the Developers' reason for claiming that their dismissal of the California Case was involuntary makes little sense. The Developers argue that since the Court's stay was a "final appealable decision" and the case could never go forward, the subsequent dismissal was involuntary. App. Br., 28-35.

It does not matter that the Court could have stayed the case indefinitely, or even that it could have eventually dismissed it. Nor does it matter that Preston wanted the case dismissed. What matters is what actually occurred. *See Lakes at Las Vegas*, 933 F.2d at 727.

The undisputed fact is that the Developers did not leave the California Case on indefinite stay. Instead, they took further voluntarily and unilateral action—they dismissed the case. That critical fact that dooms this, their third case.

The Developers claim that they were threatened with sanctions by the court if they didn't stay the case. App. Br., 34, and n.11. They are incorrect. The California court stated it would consider a motion for sanctions submitted by ***Mr. Butler*** (not Preston), if the Developers pursued a case against Mr. Butler in California while suing everyone else in Washington. CP 833. There was no threat of sanctions related to Preston.

The Developers had many options, none of which they pursued. They could have offered a ***stipulated*** order of dismissal in either of the underlying actions. Under *Specialty Auto,* this would have avoided the two dismissal rule. 153 Wn.2d at 248.

They could have let the California court dismiss the first case. On July 14, 2003, six months after the Court had stayed the case, there was a status conference at which the Court itself came close to dismissing the case. Yet the Developers objected, opting to

keep the case alive so they could voluntarily dismiss it later. CP 831-33.

After they filed the King County Case, the Developers could have waited for: (a) the California Court to dismiss the California Case on its own motion (for lack of prosecution or otherwise); or (b) Defendants' motion to dismiss the California case, which the Developers were not required to oppose. The latter is precisely what the Court, in *Lakes at Las Vegas,* said the plaintiff could have done to avoid the two dismissal rule. 933 F.2d at 727.

Finally, the Developers could have chosen to ***prosecute*** their King County Case in Washington rather than ***dismissing*** it. They do not even suggest that their 2004 voluntary dismissal of the King County Case was involuntary or non-unilateral. No defendant was served or had taken any position. There is no hint of compulsion.

5. Equitable estoppel does not apply.

The Developers allege that Defendants are equitably estopped from claiming that dismissal of the California Case was voluntary. App. Br., 40-42. Here is their entire argument:

> Preston Gates & Ellis and Mr. Neal demanded that the California complaint be dismissed. Feature [the Developers] filed the notice of dismissal only in

> reliance upon defendants' insistence that the California Court could not and should not exercise jurisdiction over Mr. Neal, personally, and Preston Gates & Ellis on ground of *forum non conveniens.* Feature will obviously be injured if Respondents are now allowed to re-characterize the California dismissal as voluntary under such circumstances.

App. Br., 41. This is just another way of arguing that the Developers were somehow duped or coerced into taking a voluntary dismissal of the California Case because of the legal arguments made by Preston.

The reasons behind the Developers' voluntary dismissal are irrelevant. *Specialty Auto,* 153 Wn.2d at 246. Regardless, the Developers cannot demonstrate the elements required for equitable estoppel. There is no inconsistent act. Like every defendant, Preston wanted the case dismissed. However, it did not stipulate to the dismissal.

Nor can the Developers show that they reasonably and detrimentally relied on Preston's legal arguments in California. Parties are responsible to conduct their own legal research. *Guillen,* 127 Wn. App. at 289-90. They cannot "detrimentally rely" upon the legal arguments made by their opponents. *Id.*

The Developers argue that the *Guillen* court rejected estoppel only because it is hard to prove against a governmental entity. App. Br., 41-42. The court rejected the estoppel claim because, as here, plaintiff could not prove the usual elements. *Guillen,* 127 Wn. App. at 289-90. No heightened proof standard was applied.

B. The Two-Dismissal Rule Benefits Mr. Neal.

The Developers claim that Mr. Neal was "dismissed" from the California Case when he successfully quashed service due to a lack of jurisdiction. App. Br., 24-28. The Developers' lengthy discussion of the effect of a motion to quash under California law is beside the point.

First, the Developers ignore the plain language of Rule 41. A voluntary dismissal under CR 41(a)(4) is:

> without prejudice, except that an ***order of dismissal*** operates as an adjudication on the merits when obtained by a plaintiff who has once dismissed ***an action*** based on or including the same claim in any court of the United States or of any state.

(Emphasis added.)

By its terms, CR 41(a) applies only when "an action" has been dismissed, and then only to an "order of dismissal." Mr. Neal only sought an order quashing the summons. The Court quashed

the summons. The undisputed fact is that the Court's January 2003 order: (a) was not an "order of dismissal" as to Mr. Neal or any other defendant; and (b) did not dismiss the "action," which was simply taken off of active status and set for a future status conference. *See* CP 1158-60. The "action" was not dismissed until July 2003, when the Developers filed their "Request for Dismissal" of "this action." CP 1168.

The Developers note that an order quashing service can be appealed. Several types of interlocutory orders, such as certain discovery orders and partial summary judgments, are appealable. That does not make any of them an "order of dismissal" of "the action" for CR 41(a) purposes.

Second, the Developers' argument ignores Mr. Neal's right, by virtue of *res judicata* and privity, to benefit from Preston's dismissal. Even if the case against Mr. Neal was fully and finally dismissed when process to him was quashed, Mr. Neal is a beneficiary of the Developers' later voluntary dismissal of Preston.

Mr. Neal, a partner in Preston, was in direct privity with Preston. *See Nelson v. Butler,* 929 F. Supp. 1252, 1259 (D. Minn. 1996) (individual lawyers are in privity with their law firms); *Woodley v.*

Myers Capital Corp., 67 Wn. App. 328, 337, 835 P.2d 239 (1992) (general partners are in privity with partnership for *res judicata* purposes). Moreover, the Developers allege precisely the same wrongdoing by him as by his firm. CP 1173-79. If CR 41(a)(4) requires that Developers' claims against Preston be dismissed with prejudice, those same claims cannot be reasserted independently against Mr. Neal. *Res judicata,* preventing re-litigation of claims that have been dismissed with prejudice, constitutes an absolute bar with respect to parties and those in privity with them. *Kuhlman v. Thomas,* 78 Wn. App. 115, 121-22, 897 P.2d 365 (1995).

This issue was raised in *Lakes at Las Vegas.* 933 F.2d at 727-28. As in our case, the dismissed defendant in *Lakes at Las Vegas* was a partnership. Another defendant, who claimed the benefit of the dismissal, was a member of that partnership. *Id.* The court rejected strict privity requirements. *Id.*, 728. It held, instead, that where the party is "substantially the same" as the dismissed defendant, the bar applies. *Id.* Thus, the Fed. R. Civ. P. 41 dismissal of the partnership barred the claim against the partner.

C. This Action Is Barred By The Statute Of Limitations.[5]

1. Overview.

This action was filed in March 2004. It is undisputed that the California Developers knew all of the elements of their claim no later than December 2000. They did not file the present action until more than three years after learning of their claim.

The Developers argue that the continuous representation exception applies, tolling the statute until Preston's representation was formally terminated (by notice of withdrawal) in early 2002. However, it is undisputed that by December 2000, when the Developers learned of the alleged malpractice, they: (a) were represented by other and independent counsel; and (b) they no longer trusted or depended upon Preston, were planning to replace Preston, and actively excluded Preston from their litigation strategy.

As a matter of law, once the client hires additional counsel and no longer depends upon his allegedly negligent attorney, the

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[5] Although technically not necessary, Preston cross-appealed the trial court's decision that material issues of fact precluded dismissal on statute of limitations grounds. This issue is only relevant if the trial court's CR 41 decision is overruled.

"continuous representation" exception ceases to apply. That is undisputedly what happened here. That is why the statute of limitations has run.

2. There are no factual issues.

The trial court identifies no specific limitations-related facts that were in dispute. Rather, it was unsure how to apply the "continuous representation" exception to Washington's discovery rule. RP 66-67.

There are no disputed facts, and the Developers did not claim otherwise. They do not dispute that by December 2000:

- They had retained Blaine Morley as their "lead counsel;"
- They had plans and had taken steps to replace Preston with other local counsel;
- They no longer trusted Preston and kept litigation strategy and other attorney-client communications from Mr. Neal; and
- They knew of the malpractice claim against Preston.

Although Preston continued to represent the Developers after December 2000, there is no evidence that the Developers depended upon Preston after that date. The undisputed evidence

is that the Developers relied on attorney Blaine Morley, who led and controlled the defense. Even the evidence submitted by the Developers on this issue demonstrates that they were no longer solely dependent on Preston.

Jack Krystal, one of the Developers, submitted a declaration opposing summary judgment. CP 856-58. Yet he never testifies that the Developers were dependent upon Preston after they hired Blaine Morley and made him lead counsel in spring 2000. *Id.* In fact, the Krystal Declaration skips over any discussion of Preston's representation from 1998 to early 2002. CP 857.

The early 2002 discussion that Krystal describes with Jerry Neal merely confirms that the attorney-client relationship was irreparably broken. Krystal demanded that Neal make things right. He threatened Neal with litigation. It reveals no dependence. Rather, it shows that the parties were already adversaries.

What remains is a purely legal question: Did the statute of limitations accrue in December 2000, when the Developers hired independent lead counsel and ceased depending and relying on Preston? Or did the continuous representation exception toll the statute of limitations despite: (a) the Developers' knowledge of the

malpractice claim; (b) their non-reliance on and distrust of Preston; and (c) their representation by independent lead counsel?

3. Under the discovery rule, the cause of action accrued in December 2000.

The statute of limitations in a legal malpractice claim is three years. It runs once a client knows all of the "essential elements of the cause of action, *i.e.*, duty, breach, causation and damages." *Matson v. Weidenkopf,* 101 Wn. App. 472, 482, 3 P.3d 805 (2000). The "discovery rule" governs the statute of limitations in legal malpractice claims unless the client demonstrates that the "continuous representation" exception applies. That exception "tolls the statute of limitations until the end of an attorney's representation of a client in the same matter in which the alleged malpractice occurred." *Janicki Logging & Constr. Co. v. Schwabe, Williamson & Wyatt, P.C.,* 109 Wn. App. 655, 661, 37 P.3d 309 (2001), *rev. denied,* 145 Wn.2d 1019 (2002); *see also Burns v. McClinton,* __ Wn.2d __, 143 P.3d 630, 635 (2006).

The trial court found that by December 2000, the Developers knew they had a malpractice claim. RP 62. That is when City of Spokane asserted that the 1998 settlement agreement was void due

to noncompliance with the Open Public Meetings Act. In December 2000, right after the City raised that issue, the Developers' lead counsel, Mr. Morley, told them they were exposed because the 1998 Settlement could be void. CP 1113-16; 1119-20; 1127-33.

This knowledge is sufficient to commence the statute under the discovery rule. The Developers could not wait until the underlying case concluded. *Huff v. Roach,* 125 Wn. App. 724, 730, 106 P.3d 268 (2005) (the cause of action accrues when the plaintiff has a right to seek relief in the courts, which is often before final judgment).

The Present Case was not commenced until March 2004, well beyond three years from December 2000. The filing of the California Case in California did not toll the statute because that case was subsequently dismissed. *Fittro v. Alcombrack,* 23 Wn. App. 178, 180, 596 P.2d 665 (1979). The King County Case, filed in 2003 and later dismissed, was never commenced for statute of limitations purposes because service was never perfected. RCW 4.16.170. Thus, under the discovery rule, the Developers did

not timely file this Present Case unless the continuous representation exception applies.

4. The "continuous representation" exception does not apply where the client retains other and independent counsel.

The "continuous representation" exception is limited. *Janicki* recognizes that where the client is no longer dependent upon the attorney, such as when new counsel is retained on appeal, the exception does not apply. *Janicki*, 109 Wn. App. at 663-64. Nor does the exception apply when other and independent counsel—here, Mr. Morley—represented the client on the same matter and at the same time as did the defendant attorney.

There is no Washington case directly on point. Courts in other jurisdictions, however, hold that the continuous representation exception applies only if client has an ongoing, dependent relationship on the allegedly negligent attorney. *Aaron v. Roemer, Wallens & Mineaux, LLP*, 707 N.Y.S. 2d 711, 272 A.D.2d 752, 754-55 (N.Y.A.D. 2000). The client's "innocent reliance" upon the attorney ends when he no longer reposes exclusive trust or confidence in the attorney, for example, when she hires additional independent counsel. *Cantu v. St. Paul Companies*, 514 N.E.2d 666

(Mass. 1987), CP 1189-92; *Dixon v. Shafton,* 649 S.W.2d 435, 438 (Mo. 1983), CP 1193-97 (the statute of limitations for legal malpractice started on the date that the client knew of the facts supporting malpractice and retained independent counsel).

Greene v. Greene, 436 N.E.2d 496, 500 (N.Y. 1982), is one of the early cases adopting the continuous representation exception. The Court noted that dependence of the client on the lawyer is the core reason for the rule. The client has "a right to repose confidence" in the attorney's ability, and "realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered." *Id.* Thus, courts generally require an "ongoing, continuous, developing and ***dependent*** relationship between the client and the attorney" before applying continuous representation. *Luk Lamellen U. Kupplungbau GmbH v. Lerner,* 166 A.D.2d 505, 506 (N.Y. App. Div. 2d 1990) (emphasis added).

When the client's dependence upon the attorney ends, and the client knows or should know of the possible malpractice, the statute of limitations begins to run. *See, e.g., Hendrick v. ABC Ins. Co.,* 787 So.2d 283, 293 (La. 2001) ("[w]hen a client does not

innocently trust and rely upon his attorney, but rather actively questions his attorney's performance" by consulting with another attorney, the continuous representation rule does not apply). This makes sense in light of the policy underlying the rule.

DeLeo v. Nusbaum, 821 A.2d 744, 750 (Conn. 2003), relied upon by Developers in their briefing below, emphasizes the importance of dependence. In *DeLeo*, a client brought a legal malpractice claim against his divorce attorney. The Court held that once there is evidence that the client "has ceased relying on his attorney's professional judgment in protecting his legal interests," the continuous representation rule does not apply. Tolling stopped as soon as the client has knowledge of the facts relating to malpractice. *Id.*, 750.

Below, plaintiff argued that tolling continues until the plaintiff hires malpractice counsel. CP 284. Such behavior is simply one manifestation of distrust. Evidence that shows no dependence, such as withholding important confidences (CP 1149-50), may also stop the tolling. *See DeLeo*, 821 A.2d at 750.

Once new and independent counsel is retained, the justifications for the exception disappear. *Coyle v. Battles*, 782 A.2d

902, 906 (N.H. 2001), rejected continuous representation because the client hired new, independent counsel. This demonstrated that the client no longer had the necessary "innocent reliance" on the first attorney. Here, the hiring of new counsel is coupled with unchallenged proof that Developers did not trust or depend on Preston.

The independent lead counsel may be: (a) malpractice counsel, as in *Cantu,* 514 N.E.2d at 667, 669; (b) replacement counsel, as in *Dixon,* 649 S.W.2d at 437-38; or (c) an attorney who represents the client on other matters, but counseled the client as to problems in the underlying case, as in *Hendrick,* 787 So.2d at 293. The purpose for which the other counsel is hired is not as important as whether, after consulting with new counsel, the client no longer depended upon the original attorney.[6]

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[6]Other cases previously cited by the Developers do not involve clients who relied upon another, independent lead attorney. *See* CP 285-86. In *Williams v. Maulis,* 672 N.W.2d 702 (S.D. 2003), there was no evidence that the consultation with new counsel about estate planning lessened the client's dependence on the first attorney. *Id.* In *Maddox v. Burlingame,* 517 N.W.2d 816, 818 (Mich. App. 1994), the Court also found that the client continued to depend upon the first attorney, despite hiring the second. *Id.* In *Morrison v. Watkins,* 889 P.2d 140, 147 (Kan. App. 1995), the client hired and then fired a second attorney, all while continuing to rely upon the first counsel.

After March 2000, when the Developers hired Mr. Morley to be their lead counsel, they were no longer dependent upon Preston. By December 2000, their lack of reliance was clear and unequivocal. It is hard to imagine stronger signals of distrust than the document, where Mr. Morley explicitly directs the Developers not to share the information with Preston. Mr. Morley wrote:

> So, I'll do the research, attend the meeting and keep you posted. Needless to say, ***do not share this memo or any part of it with anyone, including Jerry Neal.***

CP 1150. Their plan was to exclude Preston, while continuing to employ it. The Developers do not dispute it. If a client can no longer trust the attorney with litigation strategy, and actively plans to replace him (going so far as to draft the new retainer agreement), *formal* continuance of the relationship cannot toll the statute. *See DeLeo,* 821 A.2d at 750.

Below, the Developers asserted that they trusted Preston until August 2001, when their first documented threat to sue Preston was made. Although an expression of interest in suing one's counsel is sufficient, it is not necessary to break the continuity of representation. What counts is the undisputed documentary proof that in December 2000, the Developers knew of the (alleged)

malpractice, had lost confidence and trust in Preston, and were being advised by Mr. Morley on precisely the matters for which Preston had earlier been hired.

Washington policy virtually mandates application of the "independent counsel" exception to the continuous representation rule. In Washington, the ***reason*** for tolling the statute is that:

> ultimately the client has little choice but to rely on the skill, expertise and diligence of counsel. ... The primary reason for extending and applying the [discovery] rule [in professional malpractice cases] is because the consumer of professional services frequently does not have the means or ability to discover professional malpractice.

Matson, 101 Wn. App. at 483.

Here, a sophisticated client: (a) had independent lead counsel; (b) undisputedly discovered the alleged malpractice no later than December 2000; and (c) from at least that time forward, reposed no confidence in and was not dependent on Preston. Particularly in such a case, Washington's general policy favors shielding defendants from stale claims. *See Huff*, 125 Wn. App. at 731-32; *Burns*, 143 P.3d at 633.

Developers argued below that under *Janicki's* articulation of the continuous representation rule, the client's knowledge of the

lawyer's malpractice is irrelevant. CP 283-84. However, *Janicki* recognizes that where the client is no longer dependent upon the attorney, such as when new counsel is retained on appeal, the exception does not apply. *Janicki*, 109 Wn. App. at 663-64.

Although *Janicki* mentions other justifications for the continuous representation exception, the touchstone of the rule is ongoing client dependence on the first lawyer: "We emphasize, however, that the [continuous representation] rule we adopt today is a limited one. It does not apply to a client who retains new counsel on appeal." *Id.*, 663-64. The client cannot be dependent upon the attorney in the underlying matter once new lead counsel is retained.

5. Other purposes underlying the continuous representation exception do not apply.

Janicki suggests other policy reasons for the continuous representation exception. They include: (a) not disrupting the attorney-client relationship; (b) allowing attorneys the opportunity to remedy mistakes; and (c) preventing an attorney from defeating the statute of limitations by drawing out representation until the

claim expires. 109 Wn. App. at 662; *see also Burns,* 143 P.3d at 665. None of those reasons apply here.

a. The continuous representation exception does not apply because the attorney-client relationship was already disrupted.

The hiring of other, independent counsel, in and of itself, disrupts the attorney-client relationship. Where the independent counsel actively advises the client not to share information and strategy with its other attorney, the relationship is damaged. Moreover, Mr. Morley was indisputably the *lead* counsel; Preston was not the Developers' principal advisor.

b. The continuous representation exception does not apply because the alleged malpractice was not remediable.

The mere possibility that error might be corrected is not sufficient to invoke the continuous representation rule. *Janicki,* 109 Wn. App. at 662. Moreover, it was too late for remediation. *See Cawdrey v. Hanson Baker Ludlow Drumheller, P.S.,* 129 Wn. App. 810, 820, 120 P.3d 605 (2005) (where the attorney "could not have remedied [his] error or mitigated the damage it caused several years after the fact," the court declined to apply the continuous representation rule); *Burns,* 143 P.3d at 636 (the continuous

representation rule does not apply where the defendant accountant could not have done anything in an ongoing professional capacity to remedy the malpractice).

The Developers argued below that in January 2002, they asked Preston to "do whatever [it] had to do ... to get the council to approve the settlement agreement and resolve the conflict." CP 283, 857. The Developers failed, however, to present any specific evidence that demonstrated any realistic chance for Preston (or any other attorney) to cure the problem in 2002, after four years of controversy and two years of litigation. Without specific evidence, their argument is mere speculation. *Griswold v. Kilpatrick,* 107 Wn. App. 757, 27 P.3d 246 (2001); *Smith v. Preston Gates & Ellis LLP,* __ Wn. App. __, 2006 WL 3480269, *5 (2006).

No one could have undone the failure to have the 1998 Settlement approved in an open meeting. By December 2000, when the Open Public Meetings Act issue was first raised, the City would not accept the 1998 Settlement, knowing how the Developers interpreted it. *See* CP 1022, ¶¶ 11-12. In fact, the City and the Developers were in litigation in which the City argued that the settlement was void for two reasons: (a) violation of the Act; and

(b) vagueness as to critical term. CP 949-51, 957-960. That litigation continued until recently.

c. The Developers should not be allowed to extend Preston's representation so as to defeat application of the statute of limitations.

An attorney is not permitted to draw out representation after discovery of his legal malpractice in order to create a time bar to the claim. *Janicki,* 109 Wn. App. at 662. By the same token, the client is not permitted to string along the attorney, continuing to employ him (while not depending upon him) in order to lengthen the time for filing. *See Lazzaro v. Kelly,* 87 A.D.2d 975, 976 (N.Y. App. 1982).

By December 2000, the Developers knew or should have known that they had a claim against Preston. However, they continued to formally retain Preston for well over a year, while keeping secret their litigation strategy and their plan to replace Preston. The Developers do not dispute it.

The Court of Appeals has rejected a rule that would allow plaintiffs to extend the limitations period indefinitely by filing time-barred actions and waiting until the underlying case is

dismissed before filing for malpractice. *Huff*, 125 Wn. App. at 732. Such manipulations conflict with Washington's strict application of the statute of limitations.

6. The continuous representation exception does not apply because the nature of the representation changed over time.

The continuous representation exception is inapplicable when the "ongoing" representation did not involve the particular matter in which malpractice allegedly occurred. *Cawdrey*, 129 Wn. App. at 819-20. *See Burns*, 143 P.3d at 635 (representation is "continuous" only where the representation is about "the specific matter directly in dispute, and not merely the continuation of a general professional relationship").

In 1998, when Preston allegedly committed malpractice, it was representing the California Developers in connection with the 1998 Settlement. The issue being settled was whether and to what extent the Developers had been damaged by the arbitrary and capricious actions of the City of Spokane in 1994. From December 2000 on, Preston's representation of the California Developers involved a different issue: whether the 1998 Settlement was void for failure to comply with the Act. Further, the 1998 representation

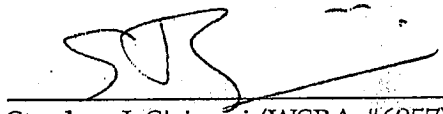
was transactional. It involved a Settlement Agreement, not any litigation. (Frank Conklin had been the Developers' litigation counsel in pre-1999 iterations of *Missions Springs v. City of Spokane.*) From 2000 on, Preston's representation was in litigation. For these reasons alone, the continuous representation rule does not apply.

V. CONCLUSION

The trial court's summary judgment of dismissal under CR 41 should be affirmed. If it is not, summary judgment should be affirmed because the Developers' claims are time-barred.

DATED: December 19, 2006.

SIRIANNI YOUTZ
MEIER & SPOONEMORE



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CERTIFICATE OF SERVICE

I certify, under penalty of perjury pursuant to the laws of the United States and the State of Washington, that on December 19, 2006, a true copy of the foregoing RESPONDENTS' BRIEF was served upon counsel of record as indicated below:

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